2524

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1851.—No. 214.

THE UNITED STATES, PLAINTIFFS IN ERROR,

VS.

WILLIAM ROBINSON, JR.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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[GIDEON, Print.]

Among the rolls and records of the circuit court of the United States, for the western district of Pennsylvania, may be found the following words and figures, viz:

No. 14, of November term, 1846.

THE UNITED STATES OF AMERICA
vs.
WILLIAM ROBINSON, jr., surety of Richard Biddle Butler, late paymaster and disbursing officer, &c.
} Dawson, Robinson, Forward, Biddle.

Summons; debt sur bond; exit August 12th, 1846.
19th August, returned served by copy, August 19th, 1846. M. 2.50.

And afterwards, to wit, on the 30th day of March, 1847, the plaintiffs, by their counsel, John L. Dawson, esq., comes and files the following declaration:

Copy of declaration.

WESTERN DISTRICT OF PENNSYLVANIA, *sct.*

William Robinson, jr., was summoned to answer the United States of America of a plea, that he render unto the said United States of America the sum of twenty thousand dollars, which he owes to, and unjustly detains from, the said United States of America.

And thereupon the said plaintiffs, by Andrew Wylie, jr., their attorney, complain, for that whereas the said defendant, heretofore, to wit, on the fifth day of November, one thousand eight hundred and forty-two, at Pittsburgh, to wit, at the district aforesaid, by his certain writing obligatory, sealed with his seal, and now shown to the court, the date whereof is a certain day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiffs in the sum of twenty thousand dollars above demanded; yet the said defendant (though often requested so to do) hath not as yet paid the said sum of twenty thousand dollars above demanded, or any part thereof, to the said plaintiffs; but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of the said plaintiffs of twenty thousand dollars; and therefore they bring their suit.

ANDREW WYLIE, Jr.,
Att'y for pl'ffs.

And afterwards, to wit, on the 17th day of May, A. D. 1847, the defendant, William Robinson, jr., by his attorney, M. Swartzwelder, esq., comes and files the following plea:

Copy of plea.

And the said William Robinson, jr., comes and defends, &c., when,

&c., and prays oyer of the obligation in the plaintiff's declaration mentioned, and of the condition thereof; which being read and heard the said William says, actio non, because he says that the said Richard B. Butler did, at all times, so long as he continued in the service of the United States as paymaster and disbursing officer, well and truly discharge and account to the proper officers of the Treasury Department for all moneys which come into his hands as such paymaster and disbursing officer, from and after the date of the said obligation, to wit, the fifth day of November, 1842, and did well and truly do and perform all things appertaining to his said office, and did faithfully pay over all sums of money at any time remaining in his hands when ordered by the proper officers of said Department; and this he is ready to verify. Wherefore he prays judgment, &c.

M. SWARTZWELDER,
Def't's' attorney.

And afterwards, to wit, on the 18th day of May, 1847, the plaintiffs, by their attorney, Andrew Wylie, esq., files the following replication:

Copy of replication.

And the said plaintiffs, as to the plea of the said defendant by him above pleaded to the said declaration, say that they, the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant; because they say that the said Richard Biddle Butler remained and continued in the service and employ of the said United States as such paymaster, as in said condition of the said writing obligatory mentioned, for a long space of time, to wit, from the day and year aforesaid, until and upon the 27th day of May, A. D. 1846; and that during the said time that the said Richard Biddle Butler so remained and continued in the said service and employment of the said plaintiffs as such paymaster aforesaid, to wit, on the first day of April, 1846, and on divers other days and times between that day and the said 27th day of May, 1846, to wit, at the district aforesaid, the said Richard Biddle Butler, as such paymaster as aforesaid, had and received for and on account of the said plaintiffs divers sums of money, amounting in the whole to the large sum of five thousand eight hundred and ninety $\frac{2}{100}$ dollars of lawful money of the United States; yet the said Richard Biddle Butler, although often requested so to do, hath not yet accounted for or paid the same or any part thereof to the said plaintiffs, but hath hitherto wholly failed and made default, and the said sum of money so had and received by the said Richard Biddle Butler as aforesaid is still wholly unpaid and unsatisfied to the said plaintiffs, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at the district aforesaid; and the said plaintiffs are ready to verify. Wherefore they pray

judgment and their debt aforesaid, together with the damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c.

On the same day the defendants, by their attorneys, Forward and Swartzwelder, file the following rejoinder:

Copy of rejoinder.

And the said William Robinson says, that the plaintiffs by any thing in their replication aforesaid, actio non, &c., because he says, that though true it is that the said R. B. Butler, during the said time that he remained in the employment of the United States as aforesaid, received said sum of $\$5,890\frac{26}{100}$ in said replication mentioned as the plaintiffs hath alleged, yet the defendant says that the said R. B. Butler, after he had received the said sum of money, to wit, on the 30th day of March, 1846, did lawfully pay and disburse to Spang & Co., for and on behalf of the United States, the said sum of $\$5,890\frac{26}{100}$, for which he obtained a lawful receipt and acquittance, which was afterwards, to wit, on the day of April, 1846, delivered to Edward Harding, captain of ordnance, and then and there the commanding officer of the Allegany arsenal of the United States, near Pittsburgh; and the said defendant says that the receipt aforesaid was a legal and proper voucher for the payment of $\$5,890\frac{26}{100}$ by the said R. B. Butler for and on behalf of the United States, and that he was lawfully entitled to a credit for the same on the settlement of his accounts as paymaster and disbursing officer aforesaid, and that the said defendant was and is entitled to require that the said credit of $\$5,890\frac{26}{100}$ should be allowed on the settlement of the accounts of the said R. B. Butler at the Department of War; and the defendant further says, that if any loss *is* happened to the said plaintiffs, by reason of the supposed default of the said R. B. Butler, all such loss and injury has accrued through the errors, mistakes, and negligence of the officers of the United States to whom it appertains to state, settle, and adjust the accounts of the said R. B. Butler, for which loss or injury the said defendant is in no manner responsible, and that the said defendant is therefore acquitted and discharged from all liability under and by virtue of his obligation aforesaid, and this he is ready to verify; wherefore he prays judgment, &c.

FORWARD & SWARTZWELDER,
Attorneys for defendant.

And on the same day the plaintiffs, by their attorney, A. Wylie, jr., esq., file the following sur-rejoinder.

Copy of sur-rejoinder.

And the said plaintiffs, as to the said rejoinder of the said defendant to the said replication of the said plaintiffs, say, that they, by reason of any thing by the said defendant in that rejoinder above alleged, ought not to be barred from having and maintaining their aforesaid action

thereof against the said defendant, because they say that the said R. B. Butler did not lawfully pay and disburse the said sum of 5,890 $\frac{56}{100}$ dollars to Spang & Co. on behalf of the United States aforesaid.

And further say, that the receipt of Spang & Co., above mentioned, was obtained from the said Spang & Co. by means of gross misrepresentations and fraud of the said R. B. Butler, and without consideration for the same to the said Spang & Co.; that the same was afterwards given up to the said Spang & Co. with the knowledge and consent of the said R. B. Butler, to wit, on the 20th day of April, 1846, at the district aforesaid, as being null and void; and that the said R. B. Butler was not lawfully entitled to a credit for the same in the settlement of his accounts as paymaster and disbursing officer, as aforesaid. And they further say, the loss of the said sum of money hath not happened to the said plaintiffs through the errors and mistakes and negligence of the officers of the United States aforesaid, but solely through and by means of the fraud, default, and misrepresentations of the said R. B. Butler.

And of this they put themselves upon the country.

ANDREW WYLIE, Jr.,
Attorney for plaintiffs.

And the defendant likewise issue.

W. FORWARD,
Attorney for defendant.

And now, to wit, May 19th, 1847, the parties in this cause being at issue, a jury being called, come, viz., Thomas Cunningham, Ashbel Clark, Samuel Roseburgh, Wm. F. Copeland, David M. Gonigle, Dennis S. Scully, Mathew B. Lowrie, John M. Davis, Joseph Fish, James Cochran, Corson Evans, and Thomas Donaldson, twelve good and lawful men, who having been duly summoned, returned, empannelled, and sworn to speak the truth, could not agree upon their verdict, were discharged by the court, and the cause continued.

And afterwards, on the 13th day of October, 1847, a deposition taken before the honorable Justice McLean, of the Supreme Court of the United States, was filed, a copy of which will be found in the plaintiffs' first bill of exceptions. Whereupon, to wit, on the 25th day of October, 1847, the following exceptions to said deposition were filed by A. Wylie, jr., esq., attorney for plaintiffs.

Copy of exceptions.

To the deposition of R. B. Butler, taken before the honorable John McLean, at Cincinnati, on behalf of said defendant, the said plaintiff objects:

First. That said deponent is not a competent person to testify in said cause.

Second. That said deposition was taken without notice given to the opposite party, or their attorney, as required by law and the rules of court.

Third. That said deposition was irregularly taken in other respects.

AND'W WYLIE,
Attorney for plaintiffs.

October 25th, 1847.

On the 19th October, 1847, the following notice was served upon Mr. Wylie, attorney for plaintiffs:

Copy of notice.

WESTERN DISTRICT OF PENNSYLVANIA, *sct.*

The UNITED STATES
vs.
WM. ROBINSON, jr., surety of R. B. Butler, paymaster and disburing agent, &c.

Action in the circuit court of the United States, for the western district of Pennsylvania.

SAME PLAINTIFFS
vs,
HARMER DENNY. } Action as above.

SIR: Please to take notice, that application will be made this day, to the honorable Judge Irwin, at the hour of three o'clock, p. m., at his dwelling house, in Allegany city, to order a rule to be entered to take the deposition of Captain Edward Harding, a witness in the above action, and who intends very shortly, and before the time of trial, to go without the district and to reside in the State of Virginia. The said depositions, when taken, are intended to be read in evidence upon the trial of the above action.

Your obedient servant,
WILLIAM WELKINS,
Attorney for defendants.

To ANDREW WYLIE, esq.,
Attorney for plaintiffs in the above action.

CITY OF ALLEGANY, *sct.*

W. O. H. Robinson, agent for the above named defendants, being duly sworn according to law, doth depose [and] say, that he believes there is immediate danger of losing the testimony of the above named Captain E. Harding, a witness in the within causes for the defendant, by his unexpected intention to go abroad, and to remove from his present residence into the State of Virginia.

W. O. H. ROBINSON.

Sworn and subscribed before me, this 19th day of October, 1847.
G. S. JOHNSTON.

Whereupon the following order was made by Judge Irwin:

Copy of order.

And now, to wit, October 19th, 1847, let the rule be issued to take depositions before Alderman Johns, at his office, St. Clair street, Pittsburgh, on Monday next, 25th inst., at 2 o'clock, p m., on three days notice to district attorney.

TH. IRWIN, *District judge.*

To the CLERK of the circuit court.

Endorsed on the back of the order and notice: October 19th, 1847. Service accepted.

A. WYLIE, Jr.,
Attorney for plaintiffs.

Whereupon the following rule was issued:

Copy of rule.

In the circuit court of the United States, for the western district of Pennsylvania.

UNITED STATES OF AMERICA vs. WM. ROBINSON, jr., surety of Richard B. Butler, late paymaster and disbursing officer. } No. 14, of November term, 1846.

Debt on bond.

And now, to wit, October 20th, 1847, rule on the part of defendant, to take the deposition of witnesses, to be read in evidence on the trial of the above cause, before Leonard S. Johns, esq., at his office, on St. Clair street, Pittsburgh, on Monday next, 25th instant, at 2 o'clock, p. m., on three days notice to the district attorney.

From the record.

H. SPROUL, *Clerk.*

Endorsed on the back: October 20th, 1847. Service accepted.

ANDREW WYLIE, jr.,
Attorney for plaintiffs.

Whereupon the deposition of Captain Edward Harding was taken, a copy of which will be found in the plaintiffs' second bill of exceptions, and part of this record.

And now, to wit, November 16th, 1847, the parties in this cause, being at issue, a jury being called, come, viz., Samuel J. Smith, Alexander W. Brewster, Samuel L. Carpenter, Wilson H. Hood, Edward Sweney, Michael Kramer, John R. Hard, Henry H. Budd, Rodney Burt, James K. Moorhead, John Beacher, and John B. Beck, twelve good and lawful men, who, having been duly summoned, returned, ballotted for, empannelled, and sworn to speak the truth, do say, that they find for the defendant. Verdict rendered on the 18th November, 1847.

1847, November 29. Judgment.

1849, March 13th. The following bill of exceptions were filed:

Copy of bill of exception.

In the circuit court of the United States, western district of Pennsylvania, of November term, 1846.

THE UNITED STATES
vs.
WILLIAM ROBINSON, jr., surety of Richard B. Butler, late paymaster, &c. } No. 14.

Be it remembered, that at the November term, 1847, of said court, before the honorable Robert C. Grier, an associate justice of the Supreme Court of the United States, holding said court at Pittsburgh, the parties in this cause were at issue upon the plea of payment as appears of record in the same, and a jury was called and regularly empannelled and sworn to try said issue; and on the trial thereof the plaintiffs, to prove the same on their part, gave in evidence a copy of a bond duly certified from the Treasury Department, in the words following, to wit:

"Know all men by these presents, that we, Richard B. Butler, of the city of Pittsburgh, and State of Pennsylvania, principal, and Harmar Denny and William Robinson, jr., of the city of Pittsburgh, and State of Pennsylvania, sureties, are held and firmly bound unto the United States of America, in the penal sum of twenty thousand dollars, lawful money, to be paid to the said United States, or to their certain attorney; for which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 5th day of November, one thousand eight hundred and forty-two.

Whereas the above bounden Richard B. Butler has been designated by the Secretary of War as paymaster and disbursing officer in the ordinance department: Now, therefore, the condition of this above obligation is such, that if the said Richard B. Butler shall well and truly discharge and account to the proper officers of the Treasury Department for all money which he may have, or which may hereafter come to his hands as such paymaster and disbursing officer, and shall well and truly do and perform all things incumbent on him in pursuance of such designation, and appertaining to his said office, agreeably to the laws and regulations relating to the War and Treasury Departments, and shall faithfully pay over all sums of money at any time remaining in his hands when ordered by the proper officers of said Departments, or either of them, this obligation to be null and void, otherwise to remain in full force and virtue.

(Signed) RICHARD B. BUTLER, [SEAL.]
Principal.
HARMAN DENNY, [SEAL.]
W. ROBINSON, Jr. [SEAL.]
Sureties.

And the said plaintiffs further gave in evidence the account of Richard B. Butler, paymaster, properly and legally certified from the Treasury Department, showing that the said Richard B. Butler, paymaster, was indebted to the plaintiffs in the sum of five thousand eight hundred and ninety $\frac{26}{100}$ dollars, on the 29th day of June, 1846, as appears by copies of the same hereto annexed and marked.

The defendant, on the contrary thereof, for the purpose of sustaining the issue on his part, then offered in evidence a deposition of Richard B. Butler, the principal in the bond, taken without notice, under the 30th section of the act of 24th September, 1789, as follows:

THE STATE OF OHIO,
City of Cincinnati.

Personally appeared before the undersigned, a justice of the Supreme Court of the United States, Richard B. Butler, now at Cincinnati, a witness of lawful age, on behalf of the defendant in a certain civil cause depending in the circuit court of the United States, for the western district of Pennsylvania, holden in the city of Pittsburgh, wherein the United States are plaintiffs, and William Robinson, jr., surety of Richard Biddle Butler, late paymaster and disbursing officer, &c., defendant; and also in a cause pending in the same court, and to be tried at the same place, wherein the United States are plaintiffs against Harmer Denny, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c., defendant; and the said witness being by me first carefully examined, cautioned, and sworn to testify the whole truth, makes oath, deposeth and sayeth, that he now resides at Cincinnati, more than one hundred miles from Pittsburgh, the place of trial; and he further states that he acted as military storekeeper, paymaster, and disbursing agent for the Government, at the United States arsenal near Pittsburgh, and while discharging these duties he made frequent and large purchases of iron for the Government from Spang & Co.; that it frequently happened that in settling with the company for these purchases he had no funds of the Government to make payment, and they being friendly to him, either took his word or check for payment, with the understanding that the check should not be presented until in funds, &c.

The deponent further says, that, in the spring of the year 1846, a bill of five thousand eight hundred and some odd dollars, approved by Captain Harding, and charged in the summary account of deponent, made up to the last day of March inclusive, was not paid that day; but to enable the deponent to make his vouchers correspond with his public account, Spang & Co. signed and delivered to this deponent the proper voucher, agreeably to the forms of the Government, and took the deponent's check on the Merchants and Manufacturers' Bank for the amount, both antedated with the knowledge and consent of Mr. McCalla, one of the partners of the firm of Spang & Co.; and, at the same time, our understanding, and the promise of said McCalla, was, that the said check should be held over for the accommodation of

this deponent, and that this deponent might, as he expected, be able to place funds in bank to meet it. And the said deponent further says, that the voucher, so signed by Spang & Co., was put into the hands of Captain Harding, the commanding ordnance officer at the arsenal, to satisfy him, or as evidence that the bill of Spang & Co. had been paid.

The deponent further saith, that he considered the arrangement with the said McCalla, and his signing the voucher, and taking this deponent's check, as closing deponent's summary account and return; and this deponent was induced to adopt this expedient for that purpose, because he was sanguine in the hope that he should be able to meet the said check, so agreed to be held over.

R. B. BUTLER."

Sworn and subscribed before me this 13th day of September, 1847.

JOHN McLEAN.

To this deposition there was appended a certificate of Judge McLean as to the production and examination of the witness before him.

To the admission of which testimony of the said Richard B. Butler, proposed to be given by the defendant as aforesaid, the plaintiffs objected, and insisted that the same could not be legally admitted for the purpose aforesaid, on the ground that the said Richard B. Butler was interested in the result, and therefore not competent to testify.

Whereupon said court did overrule said objection, and admitted the said deposition to be read in evidence; and the said plaintiffs, here in court, and during the trial of the said cause, except to the judgment, and opinion, and determination of said court in admitting said testimony; and as the facts aforesaid do not appear of record, the said plaintiffs pray that this bill of exceptions may be certified, and signed, and sealed by the judge of the said court, and that the same may become part and parcel of the record in said cause.

By the court allowed, and ordered to be lodged on file.

R. C. GRIER. [SEAL.]

To this bill of exception the counsel for defendant makes the same objections that is made at *the* this second bill of exceptions, and which is entered at the close of said bill and signed.

Copy of second bill of exceptions.

U. S.
vs.
ROBINSON.

And be it further remembered, that, at the trial aforesaid, the defendant, to sustain the issue on his part, gave in evidence certain regulations of the Ordnance department, which provide that no paymaster shall sign or receive any paper or voucher with a false date, or which

shall not represent on its face the true nature of the transaction; that no receipt shall be taken in blank, nor unless the money has been actually paid, and that no due bill, &c., for money on public account shall be given; also that all purchases and contracts for supplies, &c., shall be made by open purchase or previous advertising.

Defendant also, having given in evidence a bill of Spang & Co. for iron furnished the ordnance department, amounting to $5,890 26, approved by Captain E. Harding, the commanding officer of the Allegany arsenal, dated 30th March, 1846; also a receipt appended to the same for the amount thereof, which had been signed by Spang & Co., dated the 30th of March, 1846, but from which the signature was cut out, see copy of same annexed, marked voucher No. 21; also a check of the same date from R. B. Butler, paymaster, &c., in favor of Spang & Co., on the Merchants and Manufacturers' Bank for the sum aforesaid, protested for non-payment on the 14th of April, 1846; also a receipt from Captain E. Harding to R. B. Butler, paymaster, &c., for $1,354 88, being a balance of money remaining in his hands on account of U. S. ordnance department, as reported on the 31st March, 1846, dated 21st April, 1846; also the deposition of Captain E. Harding, as follows:

Edward Harding, of the city of Pittsburgh, having been by me first duly sworn, according to law, to testify the truth, the whole truth, and nothing but the truth, doth depose and say, that he was captain of ordnance at the Allegany arsenal during all the time that Richard B. Butler was paymaster and disbursing officer there; said Richard B. Butler was under the command of this deponent, and it was the duty of this deponent to see that his public accounts were right. The summary and quarterly accounts of the paymaster and disbursing officer were always submitted to this deponent, and by him transmitted to the Government. That on the first day of April it was the duty of said Richard B. Butler to transmit not only a summary but a quarterly account. The summary statement must go on at the end of the month, but there are twenty days allowed to send on the quarterly account. In the month of April, 1846, this deponent had in his possession the duplicate vouchers of Spang & Co., of $5,890 26, dated Allegany arsenal, March 30th, 1846. The said voucher, No. 21, of Spang & Co., for materials, was regularly receipted and entered into the accounts of the Allegany arsenal, as having been paid on the 30th of March, 1846. On the 14th of April following the check of Richard B. Butler covering the amount of Spang & Co's bill, was protested, which I understood at the time from one of the firm, they were holding over at the request of Mr. Butler. Subsequently, the friends of Mr. Butler evinced a desire to satisfy this account by other means, and for adjustment the voucher was placed in possession of Messrs. Spang & Co. It, however, was not satisfied but returned to the arsenal mutilated, as represented by Mr. Butler in his remarks endorsed on the bill.

Mr. Spang was at the arsenal to see about this matter, and the vouchers given to him with a request that they should be returned if

the matter was not settled. The vouchers were to be returned in any event, whether he was satisfied or not.

That voucher had been approved and signed by this deponent, and was in the printed and usual form prescribed by the Government. I called on Mr. McAuley, one of the firm of Spang & Co., and asked him if he had not the check. He said he had. I then asked why it had not been presented for payment? He told me Mr. Butler had requested him to withhold it for a few days. On my informing him it ought to have been presented before this, that Mr. Butler was a defaulter, and that if he did not present it he might lost the money, he expressed some reluctance at doing so, as Mr. Butler was his friend; but rather than lose the money he presented the check for payment, and it was not paid, and had it protested; all which was done according to my instructions and wish. It was our practice every quarter to make large purchases of iron from Spang & Co. Sometimes Mr. Butler would go to make the purchases and sometimes my clerk; all which received my sanction. When the summary statements were sent on at the end of the month, and exhibited the money as nearly exhausted, it was the practice of the Government to send on more funds. I do not know I had any control over the vouchers, unless there was something wrong in the figures, and then I had. If a voucher was not correct in form and substance, I would make him take it away and alter it. The commander has unlimited control over the person and papers of the officer. I told Spang & Co., with regard to this voucher, that if it was satisfied to say so, and if not to do likewise, and they chose to write me a note, and took their name off. They had no authority to withdraw their names from the voucher, nor to cut their name off. I supposed they would draw a line over their names. I had no right to give them authority to withdraw their names. It was given up with a view to accommodate Spang & Co., and in the hope that the thing would be settled. I did not authorize them to draw a line across their names. About the middle of April, 1846, the sum of $1,354 88 was paid to me, being the balance struck by R. B. Butler in his quarterly return. I arrested R. B. Butler as a defaulter about the middle of April, 1846. (The duplicate voucher and the check referred to are in the hands of Judge Wilkins, by consent of parties, and to be read in evidence.)

Cross examined by Andrew Wylie, esq.

It must have been some time after the 30th of March that Mr. Spang came to see me; it must have been within two or three days after the check was protested. Mr. Spang told me he thought the friends of Mr. Butler would come forward and pay the check. The taking of the voucher was more at my suggestion than his own. I think that Mr. Spang came out to see about that business; they wanted to get their pay. I gave the voucher to Mr. Spang, and he was to return it, whether he was paid or not. I presumed he would pass the pen

through the name of Spang & Co., because I might have done so myself if similarly situated. I thought Spang & Co. entitled to their money; and if they did not get their money the paper ought to be given up. I can't really say how long after I gave the voucher to Spang & Co. that they returned it with their name cut off; it might have been about forty-eight hours. When the paper was returned in that way it was reported that all efforts on the part of the friends of R. B. Butler had failed to pay the claims of Spang & Co. I think the voucher was returned on the latter part of April.

(To the first two paragraphs on this page, brought out by cross examination of Andrew Wylie, esq., defendant's counsel takes exception, as not proper evidence.)

(It is agreed by the parties to this suit that this deposition shall be read in the case of the U. S. of America vs. Harmar Denny, surety of Richard B. Butler, late paymaster and disbursing officer.)

E. HARDING.

CITY OF PITTSBURGH, *ss.*

I, Leonard S. Johns, an alderman in and for said city, do certify that the foregoing witness, Edward Harding, was duly qualified and examined at the time and place stated in the caption, in the presence of Hon. Wm. Wilkins and Walter Forward, counsel of defendant, and Andrew Wylie, esq., counsel of the plaintiff, at the time and place stated in the caption.

[L. S.] Witness my hand and seal the twenty-fifth day of October, 1847.

LEONARD S. JOHNS, *Alderman.*

Also evidence to show that, between the 30th of March and the 2d of April, 1846, there was money sufficient in bank to the credit of R. B. Butler to pay the check if it had been presented.

The plaintiffs, on the other hand, having given evidence to show that the date on the face of the voucher and check was not the true date, but that said papers were signed and exchanged by the parties to the transaction on the 13th of April, 1846, when Butler's credit at the bank was exhausted, and that Spang & Co. had received the voucher aforesaid from Captain Harding, with the understanding that Butler's friends were either to raise the money to pay them, or that Spang & Co. were to erase their name from the same, (Harding having denied giving such leave to erase,) that the money was not raised, and that, in consequence, Spang & Co. had cut their signature from the voucher, and in this condition returned it to Captain Harding; and some of the witnesses having stated that, at the time the check was given Butler requested Spang & Co. to hold it over for a day or two, in order that it might not embarrass the settlement he was then making of his bank account; and another, that Butler had stated that his object was to have the check paid out of the funds of the next quarter, which he expected to receive from the Government, Spang & Co. promised they would hold it in order to oblige him.

It being also proved that Spang & Co. were subsequently paid in full by the Government the amount of the bill in question, and the evidence being closed on both sides, plaintiff requested the court to charge the jury as follows:

1st. That Spang & Co. were not paid by the check of Butler, either as to Butler himself or his sureties.

2d. That there is no evidence sufficient to show that any agreement was entered into by Spang & Co. to give time to Butler, by taking his check on the bank for the amount of Spang & Co's claim, and that Spang & Co. had a perfect right to present it when they did.

3d. That the check not having been paid on presentation, there was a failure of consideration for the receipt of Spang & Co., and that the voucher is to be regarded as null and void, even as to the sureties.

4th. That if the conduct of Butler was fraudulent as to the transaction with Spang & Co., plaintiffs are entitled to recover in this case.

5th. That, taking the whole evidence in the case, the jury are bound to find a verdict in favor of the plaintiffs.

In answer to which points the court instructed the jury as follows:

"To plaintiffs' first point we cannot give the instruction as requested. Spang & Co. were not bound to receive from Butler anything but gold and silver; and if, instead thereof, they agreed to accept his check on the bank, and gave him time to deposit funds to meet it, and gave him a legal voucher, acknowledging the receipt of the money, antedated for the purpose of settling his accounts with the Government, the Government might justly treat them as paid, and would have no right to surrender such voucher to Spang & Co., in order to have resort to the sureties of Butler on the bond, without the consent of the sureties.

2d. The court refused so to instruct the jury. There is some evidence on the subject, and the jury must judge of its value and effect.

3d. The court refused the instructions here requested, but said Spang & Co. had a right to demand gold and silver before giving their acquittance; but if they chose to give it for the check, with a knowledge that funds were not then placed in bank to meet it; but trusting to the promise of Butler that he would place funds to meet it in a few days, the acquittance is not without consideration and void, as Spang & Co. have received the very consideration they had agreed to take.

4th. To plaintiffs' fourth point the court answered in the affirmative. Fraud avoids every act. If Spang & Co. accepted his check on a false representation of Butler that there were funds in the bank to meet it, they were not bound by their acquittance, nor can the sureties be entitled to any advantage from the fraudulent act of their principal.

5th. The court refused to give the fifth instruction requested by plaintiffs' counsel.

To which charge of the court the said plaintiffs, here in court and during the trial of said cause, accept and pray this their second bill of exceptions may be certified, signed, and sealed, that the same may become part and parcel of the record in said cause. By the court allowed and ordered to be lodged on file. R. C. GRIER, [SEAL.]

Associate Justice, S. C.

P. S. As this bill of exceptions has not been settled in presence of defendant's counsel, I have signed it, subject to amendments on account of omissions or otherwise which they may suggest, and which may be deemed reasonable and just.

R. C. GRIER.

February 24th, 1849.

I object to the within and foregoing bill of exceptions. It is defective and incorrect, and never has been submitted to the counsel of the defendant for examination. It was by accident that I first obtained any knowledge of the bill, on the 6th day of the present month, (January 6th, 1851.) By the endorsement on the bill, it appears not to have been filed until the 13th of March, 1849, sixteen months after the trial. The learned judge who tried the cause very properly notes, on the 24th of February, 1849, that the bill had not been settled in the presence of defendant's counsel, and was therefore only signed conditionally.

WM. WILKINS,
Attorney for defendant.

January 17th, 1851.

1851, January 4th. Writ of error issued; same day citation issued.

UNITED STATES OF AMERICA,
Western district of Pennsylvania, sct.

I, Henry Sproul, clerk of the circuit court of the United States, for the western district of Pennsylvania, do hereby certify, that the foregoing is a true and correct copy of the record and proceeding in the case of the United States vs. William Robinson, jr., surety of Richard Biddle Butler, late paymaster and disbursing officer, &c. No. 14, November term, 1846.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, this 21st day of January, [SEAL.] one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-fifth.

H. SPROUL, *Clerk.*

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the judges of the circuit court of [L. S.] the United States, in and for the western district of Pennsylvania.

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, between the United States of America, plaintiffs, and William Robinson, jr., defendant, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and

openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court of the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may correct that error, and do what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the Supreme Court of the United States, at Pittsburgh, this 4th day of January, A. D. 1851, and the independence of the United States the seventy-fifth.

H. SPROUL, *Clerk*.

I, Thomas Irwin, one of the judges of the circuit court of the United States, for the western district of Pennsylvania, do hereby allow the above writ of error. Witness my hand and seal, this 4th day of December, A. D. 1851.

TH. IRWIN. [SEAL.]

UNITED STATES OF AMERICA,
Western district of Pennsylvania, sct.

The President of the United States, to the marshal of the western district of Pennsylvania, greeting:

Whereas the United States of America has this day sued out their writ of error to a certain judgment in a certain action of debt recovered against them on the 29th day of November, 1847, in the circuit court of the United States, for the western district of Pennsylvania, in the third circuit aforesaid, by William Robinson, jr., defendant, returnable in the Supreme Court of the United States on the first Monday of December next.

These are therefore to command you, that you make known to the said William Robinson, jr., that he be and appear to the said writ of error in the said Supreme Court on the first day of the next term thereof, to hear an assignment of errors. Thereof and hereof fail not at your peril.

And how you shall have executed this writ of citation, and make return to our clerk of our said court for the western district of Pennsylvania, at Pittsburgh, on the rule day of our said court for the month of February next.

Witness the honorable Thomas Irwin, esq., judge of the United States for the western district of Pennsylvania, at Pittsburgh, this 4th day of January, A. D. 1851, and of the independence of the United States the seventy-fifth.

TH. IRWIN. [SEAL.]

Endorsed: January 6th, 1851. Served personally by copy.
L. S. JOHNS,
Deputy marshal.